

Significant Developments in Climate Change Nuisance Lawsuits

- In a high-profile climate change lawsuit, a federal appellate court has thrown out a decision that was unfavorable to defendants.

In *Comer v. Murphy Oil*, a group of Gulf Coast property owners brought public nuisance claims against a group of oil, coal, energy and chemical companies, alleging that the defendants' greenhouse gas emissions contributed to global warming, which exacerbated the effects of Hurricane Katrina. The district court's decision to dismiss the lawsuit was overturned by a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit in late 2009. The defendants then petitioned for an *en banc* rehearing by the full Fifth Circuit. Seven of the court's 16 active judges were recused—presumably for conflicts of interest—from voting on the defendants' petition, but in February 2010 a majority of the remaining nine judges agreed to rehear the case. By local rule, the decision to rehear the case automatically vacated the panel's decision.

The Fifth Circuit subsequently notified the parties that an additional recusal by one of the court's judges for unspecified reasons left it without a quorum to hear the case. In late May 2010, a majority of the eight remaining judges dismissed the appeal but explicitly declined to reinstate the panel's decision. As a result, the district court's decision to dismiss the lawsuit now governs. The plaintiffs' next step would be to file a petition for certiorari with the U.S. Supreme Court.

- The defendants in a separate climate change lawsuit, *Connecticut v. American Electric Power*, have not fared as well. The plaintiffs in *Connecticut* claimed that the defendants' power plants contributed to the public nuisance of global warming. As in *Comer*, the defendants were successful in having the lawsuit dismissed at the district court level, only to have it reinstated by the U.S. Court of Appeals for the Second Circuit. Unlike *Comer*, the Second Circuit denied the defendants' petition for an *en banc* rehearing in March 2010. Commentators expect the defendants to file a petition for certiorari with the Supreme Court.
- If the parties in either case do appeal to the Supreme Court, that court may also face a conflict of interest issue. A number of the justices have owned, and may still own, stock in the defendants in *Comer*, and one (Justice Sotomayor) participated in the lower court decision in *Connecticut*. It is unknown if other justices might also have conflicts relating to either of these cases. The Supreme Court cannot hear a case if four of the nine justices are unable to participate.